D.T.E. 01-106-A

Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 159, § 105 and G.L. c. 164, § 76 to increase the penetration rate for discounted electric, gas and telephone service.

I. INTRODUCTION

On December 17, 2001, pursuant to G.L. c. 159, § 105 and G.L. c. 164, § 76, the Department of Telecommunications and Energy ("Department") issued an Order opening an investigation into increasing the penetration rate for discounted electric, gas and telephone service. Order Opening Investigation into Discount Penetration Rate, D.T.E. 01-106 (December 17, 2001) ("Order Opening Investigation").[1] We stated that the primary objectives of this investigation are to: (1) minimize barriers in determining subscriber eligibility; and (2) ensure that eligible customers are enrolled in available discount programs. The Department expressed its commitment to taking all appropriate steps to bring the benefits of available discount programs to all eligible customers. Order Opening Investigation at 5. The Department also indicated that its purpose in initiating this investigation was to increase the penetration rate for discount service to eligible customers in a cost-effective manner while minimizing the administrative costs of providing such service. Id. at 2.

The Department requested comments from interested parties on the effectiveness of current outreach programs and enhancing enrollment procedures for eligible customers. Id. at 1. Comments were filed by the Office of the Attorney General of the Commonwealth ("Attorney General"), the Division of Energy Resources ("DOER"), the Department of Transitional Assistance ("DTA"), the Massachusetts Community Action Program Directors Association and the Massachusetts Energy Directors' Association (together,"CAPs"), Verizon New England Inc. d/b/a/ Verizon Massachusetts ("Verizon"), Boston Edison Company, Cambridge Electric Light

[1] The penetration rate is determined by the percentage of eligible households in Massachusetts that are enrolled in discount rate programs.

Company and Commonwealth Electric Company d/b/a NSTAR Electric Company, and NSTAR Gas Company (together,"NSTAR"), Fitchburg Gas and Electric Light Company ("Fitchburg"), Western Massachusetts Electric Company ("WMECo"), Massachusetts Electric Company and Nantucket Electric Company (together,"MECo"), Cape Light Compact ("Compact"), Bay State Gas Company ("Bay State"), Blackstone Gas Company ("Blackstone"), The Berkshire Gas Company ("Berkshire"), Fall River Gas Company and North Attleboro Gas Company (together, "New England Gas Company") and KeySpan Energy Delivery - New England ("Keyspan").[2] Reply comments were filed by CAPs and Verizon.

On July 16, 2002, the Department established Working Groups, consisting of representatives from utilities, state agencies, advocacy groups and Department staff, to identify issues and recommend proposals for increasing the penetration rate for discounted electric, gas and telephone service. The Working Groups focused on the following issues: (1) privacy concerns; (2) data format; (3) outreach and eligibility; and (4) on/off rate standards. On September 17, 2002, the Working Groups submitted recommendations to the Department. On October 31, 2002, based on the Working Groups' recommendations, the Department sought a another round of comments from interested parties. On November 14, 2002, comments were filed by Bay State, DOER, Verizon, CAPs, NSTAR, Keyspan, New England Gas Company and WMECo.

Based on the written comments received and the Working Groups' recommendations, the Department identifies the following issues: (1) streamlining the

[2] Initial comments were filed on January 24, 2002. Reply comments were filed on March 7, 2002.

application process; (2) establishing a central entity to collect information; and (3) implementing a computer matching program.

II. ISSUES

A. Streamlining the Application Process

1. Introduction

The Department stated that it intended to review programs and explore those actions the Department can take to increase subscribership. Id. at 5. The Working Groups noted that utilities are dependent upon the appropriate state benefit agency to verify customer eligibility for discount rate programs. The Working Groups suggested modifying the application process for public benefits to increase the penetration rate for discount electric, gas and telephone service. Given the varying income requirements for public benefit programs,[3] the verification process differs depending on the governmental agency involved in qualifying the customer for those assistance programs. State benefit agencies, such as DTA, the Division of Medical Assistance ("DMA") and

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3 Eligibility for the electric and gas residential discount rate shall be established upon verification of a customer's receipt of any means tested public benefit program, or verification of eligibility for the low-income home energy assistance program, or its successor program for which eligibility does not exceed 175 percent of the federal poverty level based on a household's gross income. G.L. c. 164, § 1F (4)(i) and 220 C.M.R. § 14.03 (2A). The Lifeline Program ("Lifeline") is a local monthly telephone discount service for qualifying customers and the Linkup Program ("Linkup") provides qualified customers with a discount on initial connection charges. Eligibility for Lifeline and Linkup is established upon verification of a low-income customer's participation in one of five federal programs: Medicaid, food stamps, Supplemental Security Income("SSI"), federal public housing assistance, or the Low-Income Home Energy Assistance Program ("LIHEAP"). 47 C.F.R. § 54.409 (b).

the Massachusetts Office of Fuel Assistance ("MOFA"), play a critical role in the eligibility verification process for qualifying customers for discount programs. State benefit agencies and utilities are prevented by law from sharing confidential, customer-specific information without the express written consent of the customer. G.L. c. 66A, § 2; G.L. c. 118A, § 6; G.L. c. 118E, § 49; G.L. c. 271, § 43. For customers applying for the discount through DTA, the utilities use an independent mailing firm to send an application to customers for participation in the discount rate program. For applicants qualifying for discount programs based on fuel assistance benefits, MOFA's application includes language authorizing the release of information to a gas, electric, or phone company offering a discount rate. Therefore, fuel assistance agencies can share their client lists directly with utilities. The Working Groups cited MOFA's application process as the more efficient method and suggested incorporating this application process with other public benefit agencies. The Working Groups recommended that DTA and DMA incorporate language on their applications that would give the agencies authorization to release eligibility information to utilities.

2. Summary of Comments

Bay State argues that the best strategy for increasing the penetration rate for discounted service is to devise the simplest and most efficient application process possible (Bay State Comments at 1). Bay State notes that many applicants for discounted service are ill-equipped to deal with a complex application process due to their limited proficiency in the English language, functional illiteracy or various disabilities (id.). DOER supports the use of a check box to inform customers of the

availability of the utility discounts and to streamline the enrollment of those customers (DOER Comments at 2). DOER recommends the check box be expanded to all state agencies offering qualifying benefits (id. at 2). WMECo argues that the use of a check box would facilitate the verification process by eliminating privacy concerns (WMECo Comments at 2).

CAPs recommended using the MOFA approach of including release authorization language on DTA and DMA application forms, with the application serving as acknowledgment of the customer's consent to release eligibility information (CAPs Comments at 6). In response to the Department's inquiry whether it would be more effective to require applicants to authorize the release of eligibility information as a condition to applying for public benefit programs, CAPs argued that there is almost no advantage, in terms of greater discount rate enrollment, but a substantial risk of legal disputes or controversy (CAPs Comments at 5). Bay State maintained that a requirement for applicants to authorize the release of eligibility information would be more effective than the use of a voluntary check box (Bay State Comments at 2). The majority of commenters suggested that the Department work with DTA and DMA to revise the application process to include language authorizing the release of eligibility information without making it a prerequisite to receiving public benefits (Keyspan Comments at 2; Verizon Comments at 5; MECo Comments at 1; NSTAR Comments at 5; Fitchburg Comments at 2). Keyspan noted the success of fuel assistance agencies and suggested that a similar computer-matching program with the DTA and DMA would increase subscribership with minimal costs to utilities (Keyspan Comments at 2).

NSTAR stated that it currently has procedures to communicate with DTA and DMA on behalf of customers that apply through NSTAR for the discount rate; therefore, the check box option would not result in significant incremental costs (NSTAR Comments at 5).

3. Analysis and Findings

The Department already requires gas and electric distribution companies to provide discounted rates for low-income customers. G.L. c. 164, § 1(F)(4)(i); 220 C.M.R. § 14.03(2A). Furthermore, G.L. c. 164, § 1(F)(4)(i) directs each distribution company to conduct substantial outreach efforts to make low-income discounts available to eligible customers. These efforts may include:

> establishing an automated program of matching customers accounts with lists of recipients of said mean tested public benefit programs and based on the results of said matching program, to presumptively offer a low-income discount rate to eligible customers so identified . . . .

G.L. c. 164, § 1(F)(4)(i). In addition, the Department previously identified Eligible Telecommunication Carriers ("ETC") who must provide discount telephone service to qualifying customers. Universal Service Programs, D.T.E. 97-103 (1997).

The Department has carefully reviewed and considered all comments received in the course of this proceeding. In addition, it is clear that gas and electric distribution companies have a legislative directive to participate in this matching program. The Department agrees with the Working Groups and commenters that the application process employed by fuel assistance agencies is a more efficient and reliable process of verifying customer eligibility for discount programs than the current process used by

utilities. While the Department believes it appropriate for ETCs to take part in this program, we believe that further investigation is in order to more fully develop the record regarding how to maximize participation by the telecommunications industry in the computer matching program. Therefore, the Department shall implement enrollment of gas and electric eligible customers into the customer eligibility verification process immediately while withholding the implementation for ETCs until the Department is able to further explore this issue in Phase II of this proceeding as described below in Section IV.

B. Establishing a Central Entity to Collect Information

1. Introduction

The Working Groups further suggested that the Department explore the use of a central entity to collect eligibility information from public benefit agencies and to match that information with utility customer lists. The Working Groups cited the success of the State of Texas with utilizing a third-party administrator to identify eligible customers and enroll them in discount rate programs. On October 31, 2002, the Department requested comments regarding the possibility of using MassCARES, a technology-based initiative of the Executive Office of Health and Human Services ("EOHHS"), in order to determine whether EOHHS' MassCARES state beneficiary database could be used to facilitate enrollment of customers in discount programs.

2. Summary of Comments

CAPs fully supports the model of a central entity gathering information that can be shared with utilities in order to facilitate higher enrollment in the discount rate

programs (CAPs Comments at 6). CAPs maintains that any new costs of moving to a third-party administrator model in Massachusetts would be outweighed by the savings utilities would realize by reducing the resources they currently devote to identifying and enrolling eligible households (id. at 7). CAPs and DOER cite the Texas model where a third-party administrator has succeeded in identifying eligible households and enrolling them into discount rate programs (id. at 6, DOER Comments at 5).

Verizon opposes the establishment of a central entity with a common database for administering these programs (Verizon Comments at 7). Verizon argues that it would be administratively costly and raise serious privacy issues (id.). Verizon and WMECo note that the implementation of a new application procedure obtaining client permission to release eligibility information may eliminate the need for a central entity to gather this information (id.; WMECo Comments at 2). WMECo and Fitchburg favor the check box approach because it should achieve the goal of increasing eligible customer enrollment without the substantial expense of establishing a central data-gathering entity (WMECo Comments at 3; Fitchburg Comments at 2). Fitchburg also argues that a third-party clearinghouse raises issues concerning the costs and cost recovery that have not been fully addressed at this time (Fitchburg Comments at 2).

Keyspan supports exploring the possibility of using MassCARES (Keyspan Comments at 3). Keyspan notes that this would obviate the need to set up separate matching programs with DTA and DMA, as both agencies are within EOHHS (id.). NSTAR and New England Gas maintained that MassCARES may provide utility companies with access to the DTA's and DMA's customer information without the

costs of creating a separate database through a third-party administrator (NSTAR Comments at 7; New England Gas Comments at 2). MECo agreed that if MassCARES would allow the utilities access to client information through a secure, web-based system, there would be no need to set up a separate central entity (MECo Comments at 2). Bay State maintains that the EOHHS is a logical choice for maintaining such a central repository of information (Bay State Comments at 2).

3. Analysis and Findings

G.L. c. 164, § 1F(4)(1) provides for establishing an automated program of matching customer accounts of electric distribution companies with lists of recipients of public benefit programs. With respect to discount telephone service, the Federal Communications Commission ("FCC") observed that New York, among other states, has substantially cut Lifeline overhead by mandating the exchange of computer files between social service agencies, which administer participation in other public assistance programs that constitute Lifeline eligibility. Universal Service Order, CC Docket No. 96-45, 12 FCC Rcd at 8976 (1996). Further, the FCC has recently proposed a rulemaking to address, among other things, verification procedures and outreach guidelines for Lifeline and Link-Up. In the Matter of Lifeline and Linkup, FCC 03-120 (2003).

The Department recognizes that the central entity model has potential to increase the penetration rate for discount service. While the Texas third-party administrator experience has proven successful, it is important to note that Texas did not have a discount rate program prior to the establishment of the central entity. Commenters

expressed interest in pursuing the possibility of using the MassCARES state beneficiary database for a computer matching program. The majority of commenters preferred exploring a computer matching program with MassCARES to avoid the set-up costs and technical uncertainties of establishing an independent central entity to gather eligibility information. Based on the comments received in this investigation, the Department concludes that employing a computer matching program, such as the MassCARES database, would increase the penetration rate for all available discount programs. We find that a computer matching program with EOHHS would be the most effective approach for identifying and enrolling eligible customers on discount programs. The Department has entered into a Memorandum of Understanding ("MOU") with EOHHS and DTA to incorporate language on their applications that would give the agencies authorization to release customer eligibility information.[4] The Department directs utilities to exchange customer information with EOHHS for the sole purpose of enrolling eligible customers in discount programs. The Department recognizes that it will take approximately one year from the date agencies begin using applications with language authorizing the release of eligibility information to utilities to implement the computer matching program. In the interim, the Department will require utilities to continue current enrollment procedures.

C. Implementation of Computer Matching Program

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[4] While DTA has committed to include language on future applications authorizing the agencies to share eligibility information with utilities, DTA has not specified the manner in which the new language will be presented on applications. The Department defers to the expertise of DTA in regard to the appropriate manner of notifying beneficiaries of the confidential transfer of data to utility companies.

1. Introduction

On April 29, 2003, the Department met with interested persons and proposed a computer matching program with EOHHS exchanging customer eligibility information with electric distribution companies, gas distribution companies and eligible telecommunications carriers for the sole purpose of enrolling eligible customers in discount programs. On July 9, 2003, the Department received a final round of comments on any legal impediment and legal justification for utility participation in a computer matching program with EOHHS for the sole purpose of identifying customers eligible for discounted service with subsequent destruction of non-matching data.

Overall, commenters were supportive of the Department's proposal to implement a computer matching program. Several commenters however, noted privacy and rate design concerns. With respect to privacy concerns, the Department notes that the Massachusetts Public Records Law protects disclosure which "may constitute an unwarranted invasion of personal privacy." G.L. c. 66, § 10. In particular, G.L. c. 4 § 7, cl. 26 (c) prevents disclosure of records relating to specific individuals. G.L. c. 4 § 7, cl. 26 (g) provides that trade secrets and commercial and financial information voluntarily provided to the government to help in policy development are not public if the government promises the provider that such information will be kept confidential. G.L. c. 66A, § 2 provides further statutory protections for preventing disclosure of personal data maintained by EOHHS.

With respect to privacy issues concerning the disclosure of customer information to EOHHS, WMECo noted that the Department has previously ordered distribution

companies to divulge customers' names, addresses and a unique identifying number (WMECo Comments

at 2, citing D.T.E. 01-54-B (2002)). The Attorney General recommends that utilities notify all residential customers of their intent to release customer information to EOHHS and provide customers the opportunity to prevent disclosure by notifying the utility (AG Comments at 4).

2. Analysis and Findings

The Department finds that a computer matching program with appropriate safeguards will streamline the enrollment of eligible customers on discount programs in a cost-efficient manner. The privacy waiver set forth on DTA applications will permit the exchange of identifying information between EOHHS and utilities. Applicants and those customers re-certifying eligibility for public benefits will have given their express written permission to share their information with utilities for the purpose of enrolling on the discount rates. In this investigation, the Department will not require utilities to divulge social security numbers, but directs utilities to provide EOHHS with each residential customer name, address and a unique identifying number. The Department directs utilities to provide, by way of a bill insert, all customers with the opportunity to opt out of having their information released to EOHHS. Therefore, residential customers not receiving public benefits will have the opportunity to opt-out of having their information released to EOHHS. Further, consistent with the legislative intent expressed in G.L. c. 164, § 1F(4)(i), we direct utilities to provide for presumptive enrollment on the discount rate provided that the customer is notified within 60 days of

all rights and obligation, including the right to withdraw from the discount rate. The Department concludes that such protections will adequately address customers' privacy interests. Finally, the Department will require each electric distribution company, gas distribution company and ETC to file annual updates on the status of discount programs.

III. CONCLUSION

At this time, we find that establishing a computer matching program with EOHHS is an appropriate step to bring the benefits of available discount programs to all eligible customers. The Department will continue to meet with Working Groups in the future to evaluate the success of the computer matching program and determine what appropriate steps, if any, are needed to increase the penetration rate for discounted electric, gas and telephone service as well as identify any problems and recommend improvements in the computer matching process. The Department intends to incorporate other means tested programs in the computer matching program and directs utilities to include other state benefit agencies in their matching programs once the Department and the relevant agency have entered into a MOU.

IV. SECOND PHASE OF INVESTIGATION

There are issues related to cost recovery that the Department intends to address by means of a separate proceeding. The Department is aware that utilities may incur a decrease in revenue relating to the computer matching program resulting from higher participation in discount rates. The Department will consider proposals for rate recovery based on increased expenses resulting from the computer matching program in

a second phase. Additionally in this phase, the Department will continue to explore how to maximize participation by the telecommunications industry in the computer matching program. Interested parties will have an opportunity to discuss these and other issues at a technical session to be held at the Department's offices at 10:00 a.m. on October 9, 2003.

V. ORDER

Accordingly, after due notice, it is

ORDERED: That all electric distribution companies and gas distribution companies shall electronically transfer residential customer account information on a quarterly basis to EOHHS for an electronic matching program with the MassCARES database for the sole purpose of enrolling eligible customers in discount rate programs, and it is

FURTHER ORDERED: That each electric distribution company and local gas distribution company organized and doing business in the Commonwealth of Massachusetts shall provide presumptive enrollment with subsequent opt out notice to customers, and it is

FURTHER ORDERED: That each electric distribution company and local gas distribution company doing business in the Commonwealth of Massachusetts shall file a report on the status of their computer matching programs six months from the commencement of the computer matching program, and it is

FURTHER ORDERED: That each electric distribution company and local gas distribution company doing business in the Commonwealth of Massachusetts comply

with the directives regarding increasing the penetration rate for discounted service contained in this Order.

By Order of the Department,

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Paul B. Vasington, Chairman

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

SEPARATE OPINION OF COMMISSIONER JAMES CONNELLY

St. 1997, c. 164, § 193, inserted G.L. c. 164, § 1F(4)(i). The General Court thereby codified–for electric distribution companies–a long-standing Department practice requiring subsidized or discounted rates for low income customers. That practice began with a petition to *allow* such rates in Massachusetts Electric Company, D.P.U. 19376, at 70 *et seq.* (1978). Department authority to establish rate subsidies and, therefore, allow cost-shifting to other rate classes was upheld on appeal in *American Hoechest Corporation* v. *Department of Public Utilities*, 379 Mass. 408, 413 (1980). The Department exercised its authority to *require* subsidies in Western Massachusetts Electric Company, D.P.U. 87-260, at 176 (1988).

Thus, *there is no dispute* as to the lawfulness of using utility companies' rates for the social or charitable end of subsidizing service to low income customers, that is, of pricing service to that customer rate-class below the cost of providing that service. The only matter remaining is how best to do so. In other words, what are the answers to certain threshold questions: How can the Department judge just what revenue effects are likely from its orders implementing § 1F(4)(i)? What facts (and supporting evidence) should underlie such a judgment? How should such revenue effects be borne: that is, who should pay for the subsidies?

Quite apart, however, from its status as a statutorily sanctioned, ratemaking objective, the augmentation of membership in subsidized rate classes envisioned by this Order involves annual revenue effects in the range of several (perhaps tens of) millions of dollars on the part of each jurisdictional company subject to the Order. As to *who* will bear these revenue effects and *how* they will be borne, the majority is silent. Yet, when it comes to ratemaking, these are not only key, but unavoidable questions; and it is best to answer them *before* striking off into *terra*

incognita without benefit of either map or compass. What is the majority's view on this point? At page 13 of the Order, there is a terse acknowledgment of the potential for "a decrease in revenue" from higher participation and of "increased expenses," but no more than passing reference. The majority's message is tantamount to "Just do it; and we'll figure out the results on both the companies and their other customers later."[1]

Due process, as embodied in G.L. c. 30A and c. 164, § 93, requires that such decisions be made on an adequate, *evidentiary* record, developed in a properly conducted and adjudicated rate case for each company affected.[2] Before undertaking what is clearly intended to be a significant shifting of costs to the companies or to their other customers, the regulator should reckon the

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[1]One apparent risk in the majority's approach comes immediately to mind. Suppose there is some significant delay before the Second Phase decision, whatever it may prove to be, is put in place to address revenue shortfalls and additional program costs. (The Order at 13 exhibits some imprecision as to whether recovery of revenue shortfalls from class-membership augmentation, or of increased program expenses, or of both, would be the subject of the Second Phase; but time evidently did not admit of clarifying this question.) Suppose further that the increased-enrollment program achieves the measure of success it is intended to have *and* that, in the interim, that increased enrollment results in unrecovered revenues from a subsidized class much larger than expected at the time rates were last set. Then, there may be experienced in that interim a significant revenue shortfall that cannot be recovered by the companies from other rate classes because of the bar to retroactive ratemaking. Such a development could expose a worthy program to a colorable challenge of confiscatory action by the regulator. See *Boston Edison Company* v. *Department of Public Utilities*, 375 Mass. 1, 10 (1978); *Boston Gas Company* v. *Department of Public Utilities*, 368 Mass. 780, 789-90 (1975) . There is no need to incur this risk and thereby jeopardize efforts to implement the statute. How much better it would be to have put that Second Phase mechanism in place before setting off into uncharted, rates-and-revenues waters. Then the twin dilemmas of unrecovered revenues and retroactive rates would not menace this important effort.

[2]One might also cite G.L. c. 159, §§ 14 and 16. Although the 17 December 2001 vote to open the investigation included telephone service, the Order at 6 and 13-14 confines itself to "electric distribution companies and local gas distribution companies," having in the eleventh hour abandoned reference to "eligible telecommunications carriers". To be sure, that was an improvement; but see footnote 3 *infra*.

likely effects of his actions and, in a manner recognized by law, provide ahead of time for their effects. Reliance on comments received under authority of G.L. c. 159, § 105, and c. 164, § 76, does not satisfy due process demands, however valuable and insightful those comments may be. Opening a rate case or devising some sort of ratemaking mechanism is the better way of taking the actions contemplated by § 1F(4)(i).

And why is that? Well, a rate case enables the Department to judge the probable, resulting size or membership of a subsidized class (i.e., to make reasonable estimates based on fact-finding, supported by tested record evidence, as to the probable subscription level of the subsidized class, or as the Order would say "penetration rate"). Having a record to support its judgment of probable class membership or subscription, the Department is then positioned to calculate the probable revenue deficiency ascribable to subsidizing that class (that is, the difference between the cost to serve the class of subsidized ratepayers and the revenues likely to be derived at the below-cost rates set for that class). Finally, upon this reasoned basis, the Department is able to set rates for other, *un*subsidized classes in order to make up the subsidy-driven, revenue deficiency. The result, though not perfect, has at least the recommendation that it can, indeed must, be based on evidence tested in an adjudicatory process. Moreover, the Department's action is subject to appeal, if it can be shown that the agency lacked substantial evidence for its conclusions or committed one of the appealable errors set out in G.L. c. 30A, § 14. In short, as noted above, the Department is "free" to choose to set rates in this way, "as long as its choice does not have a confiscatory effect or is not otherwise illegal." *American Hoechest*, 379 Mass. at 413.

But, where, as here, no adjudicatory, evidentiary record underlies the decision and the constitutional and statutory requirements of due process in rate matters have not been observed,

the Department is manifestly *not free*, apart from opening a rate case or adopting some generic deferral and recovery mechanism, to direct actions that may–or, as here, are intended to–radically change the assumptions (tested and developed in the adjudicatory crucible of each company's most recent rate proceedings) about membership in the subsidized class and that may, thereby, substantially alter the revenue-recovery opportunities implicit in and required of established rates. It is not enough to say, as the Order does at 3, that the Department's mandate is "[b]ased on the written comments received and the Working Group's recommendations." The Order at 6 cites G.L. c. 164, § 1F(4)(i), the 1997 Electric Restructuring Act's codification of earlier Department low-income subsidy programs. But the Order overlooks § 1F(4)(i)'s directive that "[t]he cost of such discounts shall be included in the rates charged to all other customers of a distribution company."[3] The legislative mandate in G.L. c. 164, §§ 1 and 1F(4)(i) is that rate structure must serve charitable ends and the cost of serving those ends is to be borne by the rates of other, unsubsidized classes and not by the shareholders of the electric distribution companies. Shifting the revenue loss to other customer classes requires a change in those customers' rates through either a rate case or, failing that, recognition of costs incurred or a deficiency in revenue resulting from the regulator's mandates between rate cases.[4] These latter can be booked for later determination and allowance or disallowance in some future § 93 or § 94 rate proceeding or

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[3]Moreover, the text of the Order at 6 betrays an evident misreading of the term 'distribution company' as used in § 1F(4)(i) and as defined in G.L. c. 164, § 1. As defined, the term does not cover gas distribution companies–and certainly not the telecommunications carriers, contemplated up to the final hour. This is plainly bad law on the majority's part.

[4]Settlements and rate freezes, for example, commonly reserve the opportunity to recover, for example, costs, lost base revenues, etc. that result from legal or regulatory change that occurs during the term of the agreement. The Department has approved many of these over the years.

through some reconciling rate mechanism. The result we have in today's Order is, to put it directly, muddled, however well intentioned though it may be. Its net effect, I fear, may be to delay meeting the goal of the statute.

And so, instead of building upon the hard work and contributions of commenters and participants in this docket, today's precipitate and unripe action puts all that at risk. The majority's means threaten crippling complications in achieving the General Court's and the Department's ends. The wiser–and the legal–course would have been to open a proper adjudicatory proceeding or proceedings in the matter, to conduct a generic rulemaking proceeding, or to announce a policy that the question of jurisdictional companies' role in promoting subscription to discount programs will be at issue in future rate proceedings.

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James Connelly, Commissioner